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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LAFFIT PINCAY, JR., Plaintiff and Respondent, v. HUNTINGTON AMBULANCE, Defendant and Appellant.	B200859 (Los Angeles County Super. Ct. No. GC032693)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Joseph F. De Vanon, Jr., Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Michael K. Johnson, Sandra M. Ishaq and Roy Weatherup for Defendant and Appellant.

Iverson, Yoakum, Papiano & Hatch, Neil Papiano, Patrick McAdam and Joanna L. Orr for Plaintiff and Respondent.

Huntington Ambulance, LLC (Ambulance), appeals from the $2.7 million judgment entered following a jury trial in favor of Laffit Pincay for personal injuries he sustained arising from a horse racing accident and from the order denying its motion for judgment notwithstanding the verdict (JNOV).[1] We affirm the judgment and the order.

Ambulance contends because Pincay failed to establish the element of causation, the judgment must be reversed and judgment entered in its favor or a new trial ordered on all issues. Alternatively, Ambulance contends it is entitled to have the judgment reduced to $150,000 by offsetting 100 percent of the amounts the settling defendants paid Pincay or, at a minimum, a new trial on the issue of damages, because the trial court abused its discretion in refusing to require the jury to return a verdict apportioning damages to those attributable as economic damages and noneconomic damages.

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[1] Ambulance purportedly appeals from the judgment, the orders "denying [Ambulance]'s motion for [JNOV], motion for a new trial, motion to set aside the judgment, and motion for apportionment of settlement offsets which was entered June 12, 2007; from any and all other orders made after trial; and from all orders made appealable thereby, including the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from."

Only the appeal from the judgment and that from the order denying Ambulance's motion for JNOV are properly before us. We note the record contains no order denying a motion to set aside the judgment by Ambulance. We therefore dismiss the purported appeal from such nonexistent order. We dismiss the appeal from the order denying Ambulance's motion for a new trial, which is not appealable. (See, e.g., *Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 79–80 [denial of new trial motion review on appeal from judgment].) The appeal from the order denying Ambulance's motion for apportionment or alternatively for a new trial on damages is also dismissed as nonappealable. (*Ibid.*; see Code Civ. Proc., § 904.1 [appealable orders]; *Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 110 [Code of Civil Procedure section 877 "'requires that a judgment be reduced by amounts paid by settling joint tortfeasors'"], italics omitted.) We also dismiss Ambulance's appeal from the remaining orders and matters as nonappealable or because whether an appeal lies cannot be ascertained in view of Ambulance's failure to identify the particular orders and matters at issue. (See Code Civ. Proc., § 904.1.)

Ambulance's contentions are unavailing. Substantial evidence supports the jury's findings that the failure of Ambulance to immobilize Pincay's neck was a substantial factor in causing the C-2 displacement of Pincay's neck. The uncontroverted evidence in the record establishes Ambulance, through its counsel, stipulated that the jury could return a general verdict rather than special verdicts allocating damages to economic and to noneconomic origins. The trial court therefore did not err in not sending the jury back to return such special verdicts. In the absence of a jury finding on economic damages in a particular amount, Ambulance is not entitled to an offset against the amount paid Pincay by any settling defendants.

BACKGROUND

As of December 1999, Pincay broke the winning record of jockey Willie Shoemaker, then a Hall of Fame jockey. Pincay earned more than all other jockeys. His career goal was to win 10,000 races, and he had won 9,530 when he retired on the advice of his doctors.

On March 1, 2003, Pincay was riding "Trampus Too" in a race at Santa Anita Park racetrack, in Arcadia, California, when another horse tripped Trampus Too, causing Pincay to fall head first onto the ground. Pincay's helmet broke and flew off his head.

Pincay sustained a fracture of the C-2 vertebra in his cervical spine as the result of the accident. He had fallen within yards of and directly in front of two Ambulance employees, emergency medical technicians (EMT's), in an ambulance. The racetrack had hired Ambulance to provide emergency medical care to jockeys in the event of injury or accident. The two Ambulance EMT's did not drive Pincay directly to the emergency room of the Methodist Hospital of Arcadia (Methodist), which was across the street about a quarter of a mile away. Instead, the Ambulance EMT's assisted Pincay to his feet and allowed him to walk to the rear of the ambulance, to bounce over bumpy terrain in transit to the first aid station, and to walk unassisted from the ambulance to that station.

At trial, the uncontroverted evidence established a broken cervical spine is unstable and therefore must be immobilized to prevent movement, but Ambulance had

failed to immobilize Pincay's cervical spine at any time. This conduct on the part of these EMT's constituted "a significant great departure from [the] standard of care."

Jeffrey Michael Pollakoff, Pincay's EMT expert, testified at trial that he saw no evidence that the Ambulance EMT's asked Pincay the three basic questions to ascertain he was alert and oriented, and thus competent to refuse treatment, or any evidence that Pincay had refused treatment. He also saw no "A.M.A.," which was a "waiver of responsibility against medical advice" form that EMT's customarily carry on a clipboard and which an injured party would sign after being told of the consequences of refusal of treatment and having refused treatment. Johnny Carbajal, the EMT driver of the ambulance, and his partner, Jeremy Phipps, each denied ever asking Pincay to sign any document that he was refusing treatment. Phipps denied hearing Pincay refuse treatment.

At the first aid station, Angel Delgadillo, a physician assistant who worked for Dr. Melvin Coats, the racetrack physician, examined Pincay and opined Pincay had suffered more of a muscle-type injury. He prescribed anti-inflammatory and pain medications and a muscle relaxer. Pincay, who had screamed when Delgadillo pushed his neck to the left, went home upon leaving the station.

On March 5, 2003, four days after the accident, due to his unresolved neck pain, Pincay went to the Methodist emergency room, where he was X-rayed for the first time after the accident. Pincay was diagnosed with a "hangman's fracture" to the C-2 vertebra of the cervical spine. Pincay was then placed into a halo brace for several months, and afterward he wore a neck brace for several more months.

Dr. Daniel A. Capen, an orthopedic surgeon who specialized in spinal surgery, opined that immediate immobilization was the treatment for an unstable cervical spine fracture because any movement after the fracture could cause "fracture displace[ment] and cause further instability to the spine." He opined the "period of time of non immobilization was directly responsible for some shifting of the vertebra." This "anterior displacement of a significant fragment of C-2" and "a posterior lesthesis or slippage backwards of the posterior margin of that vertebra" gave rise to "an increased risk [of danger of death] if there were further injury." He opined that if the fracture had never

been displaced, the spinal cord injury risks would have returned to zero, and thus if Pincay's fracture had been treated appropriately from the beginning he would have been able to continue race riding. But Dr. Capen and other doctors advised Pincay not to resume a race riding career because "[w]ith a displaced, slightly angulated spine with part of the bone taking up some of the space of the spinal canal, his risk is elevated[.]"

Pincay's economics expert testified at trial that if Pincay would have ridden for another nine years, he could have earned from $400,169,103 to $600,374,808. On the other hand, if Pincay raced only until 2008, or 5 years 10 months beyond the date of injury, he would have lost earnings of $2,945,640 up to $4,520,166. The defense forensic economist expert testified if Pincay did not suffer a career-terminating injury on May 1, 2003, he would have achieved his career goal of 10,000 horse race wins by June 2005. His total loss of earnings to June 2005, when he was age 58, would be $1,940,063. The expert further opined if Pincay rode until 2010, his loss of income would be about $3,055,000.

DISCUSSION

1. Causation Finding Supported by Ample Evidence

Ambulance contends the judgment must be reversed and a new judgment entered in its favor or a new trial on all issues ordered because the evidence on causation was insufficient.[2] We disagree.

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[2] In its motion for JNOV, Ambulance argued the judgment was unsupported by sufficient evidence of causation and therefore judgment should be entered in favor of Ambulance or alternatively a new trial should be granted. As we find substantial evidence supports the jury's findings on causation, we do not separately address the merits of the order denying the motion for JNOV. (Cf. *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1043 [JNOV proper "if there is no substantial evidence to support the verdict and the evidence compels a judgment for the moving party as a matter of law"].)

a. Standard of Review

"In a personal injury action, causation must be proven within a reasonable medical probability based on expert testimony; a mere possibility is insufficient." (*Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 476; see also *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498.)

"In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages. [Citations.] A plaintiff meets the causation element by showing that (1) the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about plaintiff's harm, and (2) there is no rule of law relieving the defendant of liability. [Citation.] These are factual questions for the jury to decide, except in cases in which the facts as to causation are undisputed. [Citation.]" (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) Plaintiff's burden is to "'introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was *a cause* in fact of the result.'" (*Ibid.*, italics added.) Where the experts' conclusions were expressed at the very least as being more probable than not, their evidence is not speculative or conjectural, and based on their evidence, the probabilities are not "'at best evenly balanced.'" (*Ibid.*)

In other words, "[t]he plaintiff is not required to establish the fact of causation with absolute certainty. It is sufficient if there is evidence from which reasonable men could conclude that it is more probable that the defendant's conduct was *a cause*, than that it was not." (*Ahrentzen v. Westburg* (1968) 263 Cal.App.2d 749, 751, italics added.) "A plaintiff may show that it is reasonably probable to infer that defendant's negligent act proximately caused his injury by circumstantial and indirect evidence; he need not show that there is no possibility of deriving any other reasonable inference from the evidence. [Citations.]" (*Valdez v. J. D. Diffenbaugh Co.* (1975) 51 Cal.App.3d 494, 509.) "'The substantial evidence standard of review also applies to the jury's findings on the issue of causation . . . .' [Citation.]" (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 695.)

b. Causation Established by Testimony of Dr. Capen

The issue of causation was the subject of a battle between opposing experts. The jury credited the opinion of Pincay's expert, which is amply supported by the evidence, and rejected that of Ambulance's expert. It is not within the province of this reviewing court to second-guess the decision of the trier of fact. (See, e.g., *Francis v. Sauve* (1963) 222 Cal.App.2d 102, 119–120 [exclusive province of trier of fact to determine credibility of experts and weight given to their conflicting testimony].)

At trial, Dr. Capen opined that "the delay in medical care and the inappropriate medical treatment at the initial evaluation was in a very high medical probability contributory to the fracture displacement and a worsening of [Pincay's] condition" and that "[t]he risk with a partially displaced versus a totally non-displaced vertebral injury is significant." He explained "a totally non-displaced fracture that does not displace . . . heals in the normal anatomic position [s]o there is no distortion of the normal anatomy of the spine." In contrast, "[i]f there is displacement, it changes not only the angulation of the spine, but . . . if there [are] any pieces of bone that are in the normal space where the spinal canal is, it reduces the size of the spinal canal, which causes closeness of the spinal cord to those pieces of bone [s]o any further injury, or sometimes even extremes of range of motion would cause those pieces of bone to irritate or compress spinal nerves or the spinal cord."

Dr. Capen further opined the "period of time of non immobilization was directly responsible for some shifting of the vertebra." He explained that "any further . . . movement [of an unstable fracture] whether it's a fracture of your arm, your leg, or the spine, any further movement because of the fracture will allow that fracture to move and displace further" and thereby cause "[f]urther injury, further pain, further . . . risk of causing bone pieces to go towards the spinal canal and take up part of the normal space of the spinal canal."

Dr. Capen opined that "[t]reatment of any fracture is immediate immobilization," which is the standard of treatment, and explained that "[t]he primary reasons to immobilize any fractures of the spine is to protect from further injury, to prevent

deformity and to promote healing." A risk of displacement, neurological damage or deformity development, "all of which [have] long term consequences," arises when the standard of treatment is not carried out.

He further opined that Pincay would probably have some "permanent pain residuals" because "when the facture heals, even with a slight amount of deformity like he has, usually that causes biomechanical stress on the discs," and if the torn ligaments "heal in anything other than normal anatomic position, further motion produces some pain and in actuality the injury itself also tears some of the fiber structures that surround the spine."

Dr. Capen testified that "if the fracture had never displaced I would not have been [telling Pincay] not to race ride, because the risks of a spinal cord injury would have gone back to zero. Any jockey takes risks by the sport itself. He would be back to zero." On the other hand, "[w]ith a displaced, slightly angulated spine with part of the bone taking up some of the space of the spinal canal, his risk is elevated, which is why I and other doctors that saw him suggested against resumption of a race riding career." He opined that Pincay would have been able to continue riding if his fracture "had been treated appropriately from the start." He explained that "any motion whatsoever, innocuous movements, turning your head, doing any activities would cause the fracture to move, and enough movement will cause the fracture to displace," and that is "the primary reason" to immobilize a fracture immediately.

Dr. Capen concluded displacement of the cervical fracture occurred after the fall based on his examination of the X-rays taken on March 5. He testified at trial that "there was an overwhelming risk that some displacement would occur over a five day period of time with a[n unstable] fracture of . . . this type with absolutely no treatment whatsoever." "The medical edict and the medical doctrines" teach that every intern, resident, and doctor is "to immobilize fractures, because fractures all initially are unstable."

Ambulance attempts to controvert Dr. Capen's above opinions on causation by pointing to his opinion in his deposition, which Dr. Capen reaffirmed at trial, that he

could not say with a reasonable degree of medical probability that a particular activity "was more likely than [another] to have caused the displacement[.]"

His deposition opinion was given in this context: "Question: Do you have an opinion whether or not any of the movements that . . . Mr. Delgadillo applied or assisted in during his examination of Mr. Pincay's neck caused any displacement? [¶] Answer: From the fact that he wasn't immobilized, any of the activities that we talked about probably on an equal basis, together with other activities of daily living have a likelihood of having contributed to displacement. [¶] I wouldn't say Delgadillo's exam[] any more than the electrical [stimulus], anymore than the massage, anymore than riding the equasizer (phonetic), anymore than the four nights of the tossing and turning that we all do when we sleep. [¶] Question: So any of those activities, in your opinion, could have caused the displacement that was identified on X-ray on March 5, right? [¶] Answer: Yes. [¶] Question: And you can't say with a reasonable degree of medical probability that any one of those activities was more likely than the other to have caused the displacement, correct? [¶] [Answer:] Correct."

Ambulance takes Dr. Capen's deposition opinion out of context. At trial, Mr. Neil Papiano, Pincay's counsel, read the remainder of Dr. Capen's answer to the last question: "Yeah, I mean, I wouldn't be able to finger one versus the other. As we already established, there was no time line of X-rays, Monday, Tuesday, Wednesday, or Thursday, to say, well, obviously what you did in this frame was worse than what you did in the other timeframe. I think that's the deadly sin, if you will was, it was improperly treated for five — or four and a half days period of time."

In context, Dr. Capen's deposition opinion simply signifies in the absence of a telltale X-ray, he could not point to any particular activity as *a cause* of the displacement. His deposition opinion does not in any way contradict or eviscerate his above trial opinions that the failure to immobilize the fracture immediately after Pincay's fall and the failure to immobilize the fracture thereafter during the days leading up to the X-rays which triggered the immobilization of Pincay's cervical spine were *the causes* "directly responsible for some shifting of the vertebra." In other words, it was Dr. Capen's opinion

that any movement during the time Pincay's cervical spine was not immobilized could have been either the cause or one of the contributing causes of the displacement.[3] These movements included Pincay standing up from his fall, his walking to the back of the ambulance, the jostling of the ambulance over the bumpy road to the first aid station, and his walking into the station.

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[3] On recross-examination, this portion of Dr. Capen's deposition was read: "[Question:] Can you say with any reasonable degree of medical probability that the displacement was caused when he was helped up from the track by the E.M.T.'s and put in the ambulance? [¶] Answer: No. I think I understand and . . . I would look at it more that there is a probability that some displacement occurred because of the four day hiatus. [¶] Was it the two E.M.T.'s picking him up? [¶] Was it the two E.M.T.'s helping him sit back in the ambulance? [¶] Was it him working out on the equasizer [*sic*]? [¶] Was it him going for walks to try to stay in shape? I don't think anybody can be certain that you could take this frame versus that frame. I think the culpability lies with the fact that he essentially received inappropriate treatment until such time that he got an X-ray."

On further direct examination, Dr. Capen explained the first part of his answer was in response to "an interruption where Mr. Papiano asked me, do I want the question read back? So I turned to him and I said no. And that's when I said, I think I understand. [¶] And that's when I said I would look at it like there is some displacement caused by the fact he did [*sic*] inappropriate treatment from the getgo."

He further explained what he meant was "[t]here is no way with certainty that you can tell anything from the time he fell until the time he got an X-ray. The only certainties are that the appropriate treatment for a neck injury is immobilization, X-ray studies. [¶] So, for me to try to say it was an E.M.T. pulling him up by the arm, versus going home and sleeping, anything with free flowing movement of the neck not protected after the time you have a fracture of this type probably contributes to further displacement, expansion of the distance between the fragments and increased angulation." He opined Pincay should have been immobilized to prevent any such movement and he could not tell whether it was the first, second, tenth or hundredth movement after that, sleeping on a pillow, walking, whatever Pincay may have done that caused the displacement, but the displacement would not have occurred if the neck had been immobilized. He added you could not "pinpoint one [cause] unless you took an X-ray every 20 minutes and say, huh, huh, you woke up with it, or you shouldn't have done the exercise or the massage did it. All you know once a fracture is done and it's unstable, anything after that contributes a worsening displacement, further damage." That is the reason for a back board and neck brace, i.e., "[t]o prevent movement, to protect the spine so that an adequate assessment can be done."

2. Refusal to Compel Special Verdicts on Damages Not Error

Ambulance contends the trial court erred in failing to direct the jury to return special verdicts allocating damages as economic and noneconomic damages because the special verdict form was incomplete in that it did not provide for allocation of economic and noneconomic damages and no prejudice would have ensued in requiring the jury to go back to the jury room and return special verdicts on economic and noneconomic damages. There was no error.

Ambulance stipulated to the general verdict form, which provided only for an unallocated damages award. Prior to its submission to the jury, Mr. Reid Smith, counsel for Ambulance, twice represented to the trial court that this form was the one agreed upon by the parties. Belatedly, Mr. Smith objected to the form only after the jury had signaled that it had reached a verdict and was waiting in the hallway to enter the courtroom. No evidence was presented that the omission from the form of special verdicts for allocation of economic and noneconomic damages was attributable to any clerical error, inadvertence, or excusable neglect.

a. Procedural Background

Initially, Ambulance and Pincay each proposed a special verdict form which provided for special verdicts on economic and noneconomic damages.[4] The verdict form given the jury, however, only provided for an unallocated damages award.[5]

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[4] The special verdicts on damages proposed by Ambulance read: "7. What are . . . Pincay's damages? [¶] a. Past economic loss, including lost earnings and medical expenses: $_____. [¶] b. Future economic loss, including lost earnings and lost earning capacity and medical expenses: $_____. [¶] c. Past noneconomic loss, including physical pain and mental suffering: $_____. [¶] d. Future noneconomic loss, including physical pain and mental suffering: $_____."

Those proposed by Pincay read: "5. What are Pincay's damages? [¶] a. Past economic loss, including lost earnings and medical expenses: $_____. [¶] b. Future economic loss, including lost earnings, lost earning capacity, and medical expenses: $_____. [¶] c. Past noneconomic loss, including physical pain and mental suffering:
(footnote continued on next page)

On May 2, 2007, during a pretrial discussion on jury instructions and the jury verdict form, Mr. Patrick McAdam, Pincay's counsel, indicated the trial court had asked counsel to look at the proposed jury verdict form and stated: "[W]e looked at it. We have submitted one that is acceptable to us. [¶] I have shown it to counsel. He has a copy, and we have discussed it briefly. I wanted you to know it's up there."

The trial court asked: "Is it agreeable to everybody?" Mr. Smith responded: "I think it's agreeable." After a brief discussion regarding jury instructions, the court again inquired: "We are okay on the verdict form?" Mr. McAdam responded yes, and Mr. Smith stated: "Verdict form is okay." Mr. Tom Nagashima, also counsel for Ambulance, was present but did not address the jury verdict form.

On May 7, 2007, after the jury had signaled it had reached a verdict, Mr. Smith stated: "I just realized that the special verdict form that was submitted and prepared by [Pincay's counsel] didn't include a break out between special damages and general damages. [¶] And if I am not mistaken, on the apportionment side between Delgadillo and [Ambulance], that would only apply to general damages, not special damages. [¶] So, we don't have a break out between non-economic and economic losses, nor do we have any break out there for past or future loss of income. [¶] So, that is a very incomplete verdict form."

Mr. McAdam, one of Pincay's attorneys, stated: "The form was shown to them. They stipulated to the form. From day one it's had — that particular form had just one number. They bring back one number. [¶] They agreed to the jury verdict form." When

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$_____. [¶] d. Future noneconomic loss, including physical pain and mental suffering: $_____."

[5] The special verdict form provided to the jury read: "7. What are . . . Pincay's damages? [¶] $_____." As returned by the jury, the form read: "7. What are . . . Pincay's damages? [¶] $2,700,000.00"

asked by the court if the "verdict form is what it is," Mr. McAdam agreed and stated: "It is what it is. They bring back the number. That's the number."

Mr. Smith argued: "The problem I think is for when the court determines apportionment, determine how to apportion damages based on the verdict form if there is comparative fault, because technically Delgadillo's apportionment of liability would only be — apply to general damages under Prop. 51."

The court responded: "At this juncture, on day four of deliberations, at 2:35 in the afternoon, when the jury has buzzed and said they had a verdict, I am going to find you gentlemen have stipulated to the use of this form, and I am not going to address it further at this juncture. Well [*sic*] have to, I guess, perhaps, maybe revisit the issue or perhaps find it to be waived. [¶] At this juncture, there is not really anything the court sees I can do with it."

The court then directed that the jury and alternates be brought in. After they entered the courtroom, the court commented: "I see some tired faces over there in the jury box."[6] The clerk of the court read each question and answer on the verdict form and

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[6] Prior to discharging the jury, the trial court told the jurors: "I know this was a particularly difficult case for some of you, perhaps for all of you. I know it was a lengthy case and all of us salute you for the amount of endeavor and hard work you put into this case." The court also acknowledged the jury was conscientious "throughout the whole case. Coming down here every morning, some days we had particularly long and lengthy testimony to sit through. I for one salute you on what I know is a very difficult task."

Earlier, on the afternoon of May 4, 2007, juror No. 4 sent a note to the trial court about chaotic deliberations, including lack of respect by some jurors, jurors quarreling about the viewpoints of other jurors and attempted intimidation of minority jurors by those in the majority, failure to review all the evidence before voting, and allowing personal experiences or argument of counsel to be used as evidence. During the discussion about the note with counsel, the trial court commented the jurors "are tired. They have been at this now since yesterday." When the jurors returned to the courtroom, the court stated: "I can look over there, I know you are all tired. I know this is a lot of work. Not only have we had a number of days of testimony, and very involved testimony, now you have been in deliberation for several days." The court sent the jury back to continue deliberations with the admonition that everyone's opinion counts

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polled the jurors if the answer to a particular question were the juror's verdict. In response to question No. 7 as to what were Pincay's damages, the answer was $2,700,000. When asked if this were the jury's verdict, all jurors except jurors Nos. 4 and 11 responded "yes."

On May 30, 2007, judgment was entered on the jury verdict in the amount of $2,700,000.

At the June 7, 2007 hearing on Ambulance's motions for JNOV, a new trial, and apportionment based on good faith settlements, Mr. Smith argued Ambulance did not waive the impropriety of the jury verdict form because it brought the issue to the court's attention before the jury announced its verdict. The court pointed out it did not hear any objection until "literally as the jury buzzed or right after the jury buzzed with a verdict," and that this was a late objection in view of Ambulance having approved the form in court on the record and after the jury had been deliberating three or four days.

Mr. Smith conceded this was not the situation of an inherent ambiguity in the verdict form which would not support a waiver and would have allowed an attorney to object to the form after the jury had been discharged. But he argued there still had been time to correct the error because the issue was brought to the court's attention before the verdict was read and the jury discharged.

The court pointed out the objection was made within a "matter of a minute . . . or two minutes before the verdict was read." Mr. Smith stated: "The first time I recognized and saw that the verdict form was incomplete, because it did not break out the economic and non-economic portions of the damage award was at the very time that the buzzer had sounded[.]" He added it was a blatant problem and "clearly a serious, serious problem for us" because the form "effectively eliminated any chance that the verdict could or the

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equally and the jurors needed to listen to and consider everyone's opinion but need not accept any other person's opinion.

jury could decide an apportionment, or the court could allocate the comparative fault under Prop. 51 . . . [a]nd for that matter, determine economic damages for purposes of the off set."

Mr. Smith argued they could have remedied the situation at that point by giving the jury "another page, and simply ask them to allocate what they thought Mr. Pincay was entitled to, if anything, for general damages, for pain and suffering. It could have been done." When the court asked if he had requested the jury be given an additional finding to be made at that time, Mr. Smith responded: "It was implicit in the objection."

The court noted that it was "going to find this to be a waiver of objections to the verdict form, that [the objection] was at the point in time when the jurors were actually at the back door. They are actually standing there. That's why I said I can't take time, now . . . . It's not like the jurors are in the jury room and we have the luxury of debating this. That's why I used the language that I used at that juncture."

Mr. Smith reiterated that he objected and the "objection was made in a sufficient time that there was no waiver and we should not be prejudiced — [Ambulance] should not be prejudiced because of the fact that we originally agreed to this special verdict form. It was not proper."

Mr. Papiano responded that Mr. McAdam's declaration probably took care of some issues and added, as the court stated, the jury was "at the door and ready to come in [when] he decided he wanted to protest the form." He argued there was "no chicanery or trickery or anything else" because the form "was written clearly in the English language"; there was a "specific agreement" as to the form "at the request of the court"; and the verdict form "had been discussed three or four days before" it was "on the record for five days."

Mr. Smith protested that if counsel had agreed to a verdict form for "one lump sum," why was the jury to return a verdict that allocated damages between Delgadillo and Ambulances' EMT's, which would be pointless, and why did the instructions direct the jury to determine economic and noneconomic damages and determine past and future loss of earnings.

The court announced it was taking the matter under submission and would review its notes and various case citations relied on by the parties. When asked if there was anything further, Mr. Smith pointed out counsel for Pincay represented in a declaration that they changed the verdict form because they only sought economic damages and never contemplated noneconomic damages. He argued the court thus had discretion to find the verdict for damages represents the jurors' finding of only economic damages and then make the appropriate allocation of settlement dollars based on that verdict. Mr. Papiano explained they were seeking damages that occurred after the accident and only for the actions of Ambulance. He indicated Delgadillo was there only because Ambulance brought him in as a witness, but there was no cause of action or anything sought against Delgadillo.

On June 12, 2007, the trial court denied Ambulance's motion for JNOV, its motion for a new trial, and its motion for apportionment based on the good faith settlements of the other defendants, or for a new trial on damages, finding: "There was sufficient evidence to justify the jury verdict, damages were not excessive, and there was no error in law necessitating a new trial."

The court specifically found: Ambulance "waived the right to an offset by agreeing to the jury [form] that was submitted to the jury. See reporter's transcript of May 2, 2007 page 2, line[s] 18-20: [¶] The Court: 'We are okay on the verdict [form]?' [¶] Mr. McAdam: 'Yes.' [¶] Mr. Smith: 'Verdict form is okay.'" The court impliedly found Ambulance's objection to the verdict form was untimely, stating: "Counsel's subsequent objection to the verdict form was after the jury had buzzed with a verdict and was gathering in the hallway to enter the courtroom. Although not directly on point, *Conrad v. Ball Corporation* 24 Cal.App.4th 439 (1994) is the case most analogous to the facts here."

b. Return of Special Verdicts on Damages Not Warranted

Here, the trial court was not required to keep a quarreling and tired jury further by directing the preparation of a new or supplemental jury verdict form providing for special verdicts allocating damages as to economic damages and noneconomic damages and then

direct the jury to go back to the jury room, deliberate, and return special verdicts on economic and noneconomic damages.

Ambulance does not dispute Mr. Smith, its counsel, stipulated to the jury verdict form providing only for a verdict of unallocated damages in a lump sum. We reject as untenable its position that the stipulation was not binding because Mr. Smith was not authorized to stipulate away Ambulance's right to an offset based on the good faith settlements of the other defendants, which resulted when the jury does not return a special verdict allocating damages as economic damages. Generally speaking, control over the procedural aspects of a case is within the province of the attorney. Whether a particular jury instruction or jury verdict form should be given or not is a tactical choice for the attorney according to his or her expert opinion rather than a matter within the control of the client. (See *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 ["where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error," particularly "in the area of jury instructions"].) Accordingly, Ambulance is bound by its counsel's stipulation to the jury verdict form providing for an award of unallocated damages.

The jury verdict form therefore was not "incomplete" because the form was not required to provide for special verdicts on economic and noneconomic damages. Return of special verdicts on economic and noneconomic damages therefore was not necessitated because the verdict returned by the jury was complete. And there was no ambiguity or inconsistency in the returned verdict itself which would render the general verdict for unallocated damages defective and thus mandating the jury correct such defective verdict. (See *Greer v. Buzgheia* (2006)141 Cal.App.4th 1150, 1159 ["verdict here did not suffer from any legal defect — it simply was not *specific enough* to render it amendable to the type of challenge defendant now raises"].)

Additionally, that the jury had not yet returned its verdict or been separated, much less discharged, is not determinative. (Cf. *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131 [waiver of special verdict form error by failing to object prior to

jury discharge].) "Unless the trial court, in its discretion, permits a party to withdraw from a stipulation [citations], it is conclusive upon the parties, and the truth of the facts contained therein cannot be contradicted. [Citations.]" (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142.)

No evidence was presented from which the trial court could infer that the absence of special verdicts for economic and noneconomic damages on the jury verdict form was due to clerical error, inadvertence, or excusable neglect which would justify relieving Ambulance from its stipulation and thereby compel the jury to return such special verdicts. (See *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 671 [no relief where failure to include attorney fees and costs in offer professional mistake rather than type of mistake ordinarily made by lay person]; cf. *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 252, 259 [clerical error of legal assistant in typing offer to take judgment "against" the client instead of "in favor of" the client].)

3. Reduction of Judgment to $150,000 Not Supportable

Ambulance contends the judgment must be reduced to $150,000 based on the offset of the aggregate $2.55 million the other defendants paid Pincay in their respective good faith settlements. We find no basis in fact or law to mandate or warrant any reduction in the judgment.

A nonsettling defendant is entitled to an offset of that portion of a good faith settlement attributable to the plaintiff's economic damages. It is well established that the good faith settlement offset is calculated in this manner: First, the jury must return a special verdict allocating economic and noneconomic damages. The court determines the percentage of the total damages awarded attributable to economic damages. The court then applies this percentage of the damages awarded to the settlement amount in order to determine that portion of the settlement attributable to economic damages. The verdict against the nonsettling defendant then is reduced by just this economic damages portion of the settlement. (See, e.g., *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276–277; see also *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1399; *Ehret v. Congoleum*

Corp. (1999) 73 Cal.App.4th 1308, 1320; *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 838.)

"Courts have held in some circumstances that a defendant who fails to request a special verdict segregating the elements of damages forfeits the right to challenge a separate element of damages on appeal. [Citations.] The reason for this rule is that a reviewing court ordinarily cannot determine what amount was awarded for each element of damages requested and therefore cannot determine whether any error with respect to a particular element of damages was prejudicial. [Citations.] Thus, the rule is based on the presumption that an appealed judgment is correct [citation] and the requirement that an appellant must present a record sufficient to overcome that presumption [citations]." (*Gillan v. City of San Marino*, *supra*, 147 Cal.App.4th at p. 1053.)

It cannot be gainsaid that Ambulance expressly agreed to submit a jury verdict form for a general verdict only. Its failure to require the jury to return special verdicts apportioning damages to economic and noneconomic damages therefore forfeits any right Ambulance may have had to an offset based on the good faith settlements of the nonsettling defendants.[7] Ambulance's right to obtain an offset based on the good faith settlements therefore was extinguished by its failure to obtain a special verdict on economic damages. (See *Conrad v. Ball Corp.*, *supra*, 24 Cal.App.4th at pp. 443–444 ["we cannot calculate the percentage of the jury award attributable to economic damages" because the "verdict did not specify economic and noneconomic damages, but merely awarded an undifferentiated lump sum of $275,000"].)

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[7] On April 10, 2006, the trial court entered an order determining the settlement for a $1.55 million payment to Pincay to be in good faith. Although on its face the settlement was made only between Pincay and Los Angeles Turf Club, Inc. (LATC), when viewed in context the settlement clearly encompassed all the racetrack defendants, i.e., LATC, Magna Entertainment Corp., and the Santa Anita Companies, Inc.

On June 12, 2006, the court entered an order determining the settlement for a $1 million payment to Pincay by Delgadillo and Dr. Coats to be in good faith.

That Pincay's reason for a general verdict rather than special verdicts on damages was that he sought only economic damages does not compel a contrary conclusion. Evidence of noneconomic damages, pain and suffering, including emotional distress, was presented to the jury and the jury was instructed on economic and noneconomic damages. We cannot peek into the mental processes of the jury to ascertain the precise composition of the unallocated damages awarded, which therefore remain unknowable.

4. Fifty Percent Allocation of Fault Does Not Compel Recalculation of Damages Awarded

Ambulance argues that because the jury returned a verdict finding Pincay's damages to be 50 percent attributable to the negligence of Ambulance and 50 percent attributable to the negligence of Delgadillo, the unallocated damages awarded Pincay should be cut in half. We disagree.

"The following principles have been established. First, each defendant is solely responsible for *its share of noneconomic damages* under Civil Code section 1431.2. Therefore, a nonsettling defendant may not receive any setoff under section 877 [of the Code of Civil Procedure] for the portion of a settlement by another defendant that is attributable to noneconomic damages. [Citations.] Second, where a plaintiff has received a pretrial settlement from a different defendant, the portion of the settlement which may be set off from a subsequent jury award of economic damages to the plaintiff must be determined by application of the percentage of the jury award of economic damages in relationship to the total award of damages. [Citation.]" (*Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1838–1839, italics added; see generally Civ. Code, § 1431.1 et seq. [Prop. 51].)

"In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable *only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault*, and a separate judgment shall be rendered against that defendant for that amount." (Civ. Code, § 1431.2, subd. (a), italics added.)

Although the verdict reflects the jury found the negligence of Ambulance and that of Delgadillo equally (50 percent each) to have caused Pincay's total damages, it does not differentiate between economic and noneconomic damages. In the absence of an award of noneconomic damages in a specific amount, Ambulance is not entitled to "a separate judgment" "only for the amount of non-economic damages allocated to [Ambulance] in direct proportion to [its] percentage of fault[.]" (Civ. Code, § 1431.2, subd. (a); cf. *Conrad v. Ball Corp.*, *supra*, 24 Cal.App.4th at pp. 443–444.)

DISPOSITION

The judgment and the order appealed from are affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.